Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 98-82
and Competition Act of 1992	)	
	)	
Review of the Commission's	)	
Cable Attribution Rules	)	

To: The Commission

COMMENTS OF MEDIACOM LLC

MEDIACOM LLC

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SUMMARY

The current cable-MDS cross-ownership restrictions are more restrictive than the other cable attribution rules or the broadcast attribution standards. These restrictive standards imply that the risks to competition in the cable-MDS cross-ownership setting are much greater than in the other contexts. However, the Commission has provided scant information as to why cable-MDS attribution merits a stricter standard. The Commission should focus its attribution rules on interests which actually confer some measure of control. Minority share, third-party, non-media institutional investors who are fully insulated from the operating entities and can therefore not exert any influence or control should not be precluded from investment interests in cable and MDS.

The goals of the cable-MDS cross-ownership rule are to preclude the possibility of warehousing competition and to promote competition to incumbent cable operators. It is difficult to see how insulated, minority share, institutional investors could possibly be detrimental to either of these goals. On the contrary, competitors to cable such as MDS are in dire need of capital infusions to finance their operations. Restrictive attribution rules hinder the ability of such competitors to raise capital.

The Commission should revise its cable attribution rules to permit investments which do not implicate the policies behind either the cable attribution rules or cable-MDS cross-ownership. In particular, the Commission should increase the level of non-attributable voting stock interest from 5% to at least 10%. An ownership interest of 10% simply does not confer the degree of ownership or control to implicate the concerns of the attribution rules. Second, the Commission should apply the limited partnership insulation criteria to LLCs. The Commission currently treats LLCs as limited partnerships on an interim basis in the broadcast context. A presumption should exist that treatment of cable attribution in LLCs should mirror attribution of LLCs in the broadcasting context. Finally,

the Commission should apply the passive investor category from the broadcast rules to cable attribution for cable-MDS and broaden it to include institutional investors. The need for capital to realize the Commission's competitive goals and the generally passive nature of investments by institutional investors justify application of the passive investor category to cable-MDS attribution and the expansion of the category to include institutional investors.

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Mediacom LLC ("Mediacom"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking in CS Docket No. 99-82, FCC 98-112, released June 26, 1998 ("NPRM"). Mediacom owns and operates a number of cable television systems in smaller markets, particularly in the southeastern states. Mediacom believes that the Commission's attribution rules for cable-MDS cross-ownership should be substantially relaxed, particularly as they affect passive investors. Given that the rules are intended to identify those relationships that confer influence or control on the attributed entity, the current cable-MDS attribution rules are overly restrictive and threaten the much needed infusion of capital into new and existing communications entities, including cable television systems and their competitors.

While Mediacom's arguments herein are intended to apply generally to the Commission's cable attribution rules, Mediacom has a particular interest in the effect of the rules on its acquisition of multiple cable systems from Cablevision Systems Corporation ("Cablevision Systems"). Chase Manhattan Capital, L.P./CB Capital Investors, L.P. ("Chase"), currently holds a less than 10%

interest in Mediacom. Simultaneously, Chase holds a 23% interest in Wireless One, Inc. ("Wireless One"), a provider of wireless cable service in many of the franchise areas formerly served by Cablevision Systems and now served by Mediacom. Because Chase's interests in Mediacom and Wireless One currently are attributable for purposes of the Commission's cable-MDS cross-ownership restriction, Mediacom needed, and obtained, a twelve-month waiver of the application of the restriction.[1]

Investments such as Chase's interest in Mediacom promote the Commission's goals of increasing competition to cable and attracting capital to new and existing market entrants. At the same time, investors such as Chase pose threats neither to the policies underlying the cable attribution rules nor those forming the basis for the cable-MDS cross-ownership restriction. Therefore, Mediacom urges the Commission to revise its cable attribution rules such that the rules do not preclude vital capital sources such as institutional investors from making limited investments in cable systems and wireless providers.

I. REGULATING INSTANCES OF TRUE INFLUENCE AND CONTROL MUST UNDERLIE THE COMMISSION'S REVIEW OF THE CABLE ATTRIBUTION RULES

A. The Attribution Rules are Designed to Identify Interests Conferring Ownership and Control but Fail to Promote Equally Valid Interests of the Public

As the Commission reviews the cable attribution rules, it is appropriate to reexamine whether these rules truly serve the public interest. In the instant NPRM, the Commission explained that its ownership attribution rules "are intended to identify those relationships that confer on their holders a degree of influence or control over key business decisions . . . [and] identify ownership or other

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[1] *See* Letter from Roy J. Stewart, Chief, Mass Media Bureau to Stuart F. Feldstein, Counsel to Mediacom LLC, January 16, 1998.

relationships that could provide the entities involved with economic incentives to operate in conflict with the objectives of the particular cable regulation at issue."[2] However, the Commission would serve the public interest by drafting a less inclusive rule that focuses on prohibiting those relationships that involve true control over another entity. Moreover, as presently drafted, the rules slight other important interests.

In the past, the Commission has recognized that narrow attribution standards have hampered investment in and development of alternate methods of delivering video programming. The Commission raised the permissible common ownership between telephone companies and video programmers from 1% to 5% voting or nonvoting stock, "as long as the ownership relationship does not constitute ownership or control."[3] Nonetheless, the raising of the bar did not adequately encourage and support investment in video dialtone. The current rules are similarly deficient in promoting investment.

The current cable-MDS cross-ownership restrictions, which are "designed . . . to deter specific discriminatory or improper conduct by cable operators,"[4] are more restrictive than the other cable attribution rules or the broadcast attribution standards. The more restrictive standard attributes all voting and nonvoting stock interests and limited partnership equity interests (irrespective of insulation measures) above 5% and does not apply the single majority shareholder exception applicable in the broadcast setting.

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[2]NPRM at ¶ 12.

[3]Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781 (1992), at ¶ 32.

[4]NPRM at ¶ 5.

These heightened standards on cable-MDS attribution imply that the risks to competition in the cable-MDS cross-ownership setting are so much greater thereby justifying inclusive treatment of very limited interests. The Commission has cited the goal of "promot[ing] diversity and competition in general" but has otherwise provided scant evidence why cable-MDS attribution merits a stricter standard. The current rule begs the question as to how a third party, minority share, non-media institutional investor fully insulated from one of the entities in question could exert any influence or control, let alone in an anticompetitive fashion. In fact, as discussed below, by providing access to capital, investors such as Chase advance the Commission's competition and diversity goals without raising anticompetitive concerns.

B. The Goal Of The Cable/MDS Cross-Ownership Restriction Is To Prevent Cable From Warehousing Competition And To Promote Competitors To Cable

The attribution of Chase's investments in Mediacom and Wireless One as conferring ownership or control is similarly puzzling when one considers the policies underlying the cable/MDS cross-ownership restriction. The Commission's cable-MDS restriction,[5] implementing Section 613(a) of the 1992 Cable Act,[6] is designed to: (1) prevent cable operators from "warehousing" potential competition by obtaining MDS licenses within their service area; and, as pointed out in the NPRM, (2) "encourage the development of competition to established cable operators by alternative multichannel video service providers."[7] Congress envisioned Section 613(a) as a complement to the Commission's other cross-ownership restrictions that "enhance competition" by "further

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[5]47 C.F.R. § 21.912.

[6]Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[7]NPRM at ¶ 6 (footnote omitted).

diversify[ing] and prevent[ing] cable from warehousing its potential competition."[8] The Commission cited this legislative history to acknowledge the goals of preventing cable-MDS cross-ownership even as it recognized that the current cable-MDS attribution rules were overbroad.[9]

The clearly identified twin goals of the cable-MDS cross-ownership rule necessarily imply that investments that do not raise a possibility of "warehousing competition" and that do promote competition to incumbent cable operators ought not to be subject to the restrictive cable-MDS attribution standard. Again, as discussed *infra*, it is difficult to imagine how Chase, as an institutional investor would want to or could use its minority-share investments in Mediacom and Wireless One to reduce competition to cable. The small degree of overlap between the areas served by Mediacom and those served by Wireless One underscores the lack of incentive to behave in an anticompetitive fashion.[10] Indeed, it is quite apparent that it is only through investments such as Chase's interest in Wireless One that alternative MVPD providers have obtained access to capital necessary to develop as competitors to cable.[11]

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[8]S. Rep. No. 92, 102nd Cong., 1st Sess. 47 (1992).

[9]In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice Of Proposed Rule Making, MM Docket No. 94-150, FCC 96-436, 11 FCC Rcd 19895 (1996) ("1996 FNPRM"), at ¶ 44 ("This strict attribution standard severely restricts investment opportunities that are compatible with our goal of strengthening wireless cable and providing meaningful competition to cable operators.").

[10]With few exceptions, Mediacom systems located within Wireless One's service areas serve an average of only 900 subscribers per franchise area. The largest aggregate number of cable subscribers in any single market represents approximately 10% of the households in the DMA.

[11]Indeed, it has recently been reported in the trade press that Wireless One is in need of a significant capital infusion. *Cable Day*, August 11, 1998.

C. The Commission Must Also Consider The Effect Of The Cable Attribution Rules On The Need To Attract Capital And Changes In The Video Competition Marketplace

While the Commission seeks to effectuate its cable-MDS cross-interest policy through attribution, it is equally apparent that the Commission cannot examine those rules in isolation from other fundamental policies related to and affected by the cable attribution rules or from ongoing developments in the MVPD market. At the outset, the deregulatory approach toward communications industries of the Telecommunications Act,[12] as exemplified by the biennial review requirement pursuant to which the Commission initiated this instant rule making, bears repetition. The biennial review requirement for the Commission to modify or discard regulations no longer in the public eye is a clarion call to the Commission to cast a skeptical eye toward regulations that have remained in place even as the communications marketplace has undergone near revolutionary change. Indeed, by eliminating a number of long-standing ownership restrictions, including the ban on cable/telco cross-ownership and the statutory restriction on co-ownership of co-located cable and broadcast television stations, Congress signaled its deregulatory approach. It is only logical that as Congress has eliminated or modified cross-ownership restrictions, a presumption should exist that attribution standards should undergo a similar liberalization.

Indeed, the changes in the communications marketplace generally, and the MVPD market specifically, since the Commission adopted the broadcast attribution standards have been significant, to say the least. Even since the 1992 Cable Act, the MVPD marketplace has undergone radical change as new market entrants have increased the competition to cable to provide video delivery service. Where cable and broadcasting provided almost all video programming delivery service to

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[12]Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act").

consumers in 1992, today DBS, which currently has over 7 million subscribers,[13] wireless cable, video services provided by telephone companies through OVS, and the soon to be launched LMDS all vie for MVPD subscribers. Therefore, speculation about the competitive incentives of cable companies even as recently as 1992 must be reexamined in light of the highly competitive MVPD marketplace.

Perhaps most importantly, the Commission must consider the effect of its attribution rules on the critical need to attract capital to communications entities. The Commission has repeatedly emphasized the importance of investment to the development of competition in communications industries, and particularly to the cultivation of competitors to cable. Indeed, in proposing a relaxation of the strict attribution standards for cable-MDS cross-ownership, the Commission recognized in 1996 that "the strict [cable-MDS] attribution standard severely restricts investment opportunities that are compatible with our goal of strengthening wireless cable and providing meaningful competition to cable operators."[14] Of course, as the Commission has noted in the broadcast attribution context, institutional investors such as Chase represent a large and ready source of this much-needed infusion of capital.[15]

But the need for capital in the cable-MDS context goes beyond the need to promote competitors to cable such as MDS. As it undergoes massive upgrades to its infrastructure to accommodate Internet access services, voice and data communications and the transition to digital

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[13]Monica Hogan, "DBS Sales Heat Up in June," Multichannel News, July 20, 1998, at 3.

[14]1996 FNPRM at ¶ 44.

[15]Review of the Commission's Regulations and Policies Affecting Investment In The Broadcast Industry, Notice of Proposed Rule Making and Notice of Inquiry, 7 FCC Rcd 2654 (1992) ("Broadcast Investment NPRM"), at ¶ 10 ("[raising the voting stock benchmark for passive investors] should be particularly effective in increasing capital availability given the substantial resources which institutional investors, such as insurance companies and mutual funds, can make available to media enterprises.").

television, the cable industry desperately needs to attract capital to help finance these extraordinary undertakings. Some reports estimate that cable operators are in the process of spending between $20 and $28 billion to upgrade their systems and prepare for the provision of these new services.[16] As the Commission recognized in the digital must-carry Notice, these financial obstacles are particularly daunting for new market entrants and small cable operators such as Mediacom.[17] Overly restrictive attribution rules hinder the ability of cable companies to amass the capital needed to meet consumer needs and congressional goals of faster Internet service, voice and data communications via cable and the rollout of digital television in the ensuing years.

Thus, it is clear that the Commission must reexamine its cable attribution rules in light of: (1) the goals of identifying relationships that confer influence and control; (2) the underlying policies of the cable-MDS cross-ownership restriction; (3) profound and ongoing changes in the competitive communications marketplace; (4) Congress' deregulatory approach in the Telecommunications Act; and (5) the need to allow the free flow of capital to promote competitors to cable and to finance cable's extensive system upgrades.

II. THE CABLE ATTRIBUTION RULES ARE OVERLY RESTRICTIVE IN GENERAL, AND ESPECIALLY AS THEY TREAT INVESTMENTS THAT DO NOT CONFER INFLUENCE OR CONTROL

An assessment of these five factors clearly illustrates that the current, severely restrictive version of the cable attribution rules is overbroad, actually frustrating Congress' goals by deterring needed investment does not implicate the policies underlying the Commission's cable-MDS cross-

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[16]Thomas J. Duesterberg, "Learn from History: Let Cable Evolve," The New York Times, July 5, 1998.

[17]Carriage of the Transmission of Digital Television, Notice of Proposed Rule Making, CS Docket No. 98-120, FCC 98-153 (rel. July 9, 1998), at ¶ 52.

ownership restriction. The Commission should relax the cable attribution rules generally to realize its goals of attracting capital, promoting new market entrants, and eliminating burdensome regulations.

If the cable attribution rules are too restrictive generally, they are definitely overbroad as applied to insulated investors such as Chase. Assessing Chase's investments in Mediacom, it is almost ludicrous to ascribe an intent to Chase either to attain any meaningful ownership or control over either company or to "warehouse" competition to Mediacom through its interest in Wireless One. Chase's "activities" in Mediacom are so minimal so as to make Chase a virtual bystander in the management of Mediacom. Chase does not act as an employee of Mediacom nor do its functions, directly or indirectly, relate to the media enterprises of Mediacom. Chase does not serve, in any material capacity, as an independent contractor or agent with respect to Mediacom's media enterprises. Chase does not perform any services for Mediacom materially relating to its media activities other than to provide capital or to act as a surety. Further, Chase is not currently and will not become actively involved in the management or operation of the media business of Mediacom and has no power to direct the Manager of Mediacom on matters pertaining to the day-to-day operations of Mediacom's business.

Although Chase retains some voting rights, they are rigidly circumscribed. First, Chase is not represented on Mediacom's five member Executive Committee. Second, Chase' vote on the admission of new members is subject to the power of Mediacom's Manager to veto any such admissions. Third, Chase may not vote to remove the Manager except where the Manager has been adjudged to have engaged in "willful misconduct" or "gross negligence."

In no respect would it be accurate to say that Chase's interest in Mediacom confers on it any meaningful influence or control over the management, personnel, or other business decisions of

Mediacom. However, under the current attribution rules for cable-MDS ownership, Chase's less than 10% interest in Mediacom is treated the same as if Chase's agent served as the President of Daily Operations of Mediacom. As described above, nothing could be further from the truth. Chase's spectator role in Mediacom's management of cable systems therefore begs the question of how Chase's interest could threaten the policies behind the cable/MDS attribution rules and the cable-MDS cross-ownership restriction. Assuming *arguendo* that Chase wished to exercise some control over Mediacom's management,[18] the limited size of its interest prevents it from assuming more than a token presence in the management of Mediacom. But more importantly, the web of restrictions on Chase' influence on Mediacom's decision to admit other members, the performance of Mediacom's Manager, or day-to-day management renders it incapable of exercising any meaningful influence or control.

Similarly, the kind of limited investments that Chase holds in both Mediacom and Wireless One do not, indeed, could not, implicate the rationale underlying the cable-MDS cross-ownership restriction. Again, assuming *arguendo* that Chase sought to "warehouse" Mediacom's competition by obtaining an interest in Wireless One and presumably failing to fully exploit Wireless One's competitive potential, several obstacles stand in the way of such a far-fetched scheme. First, the recent growth in the MVPD marketplace would render such a strategy self-defeating. Wireless One subscribers frustrated by its poor service could simply subscribe to DBS, or OVS or the soon-to-be-launched LMDS, foiling any strategy designed to trap MVPD subscribers in a monopolistic market. Chase and Mediacom can no more prevent the increasingly competitive position of alternatives to

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[18]It bears emphasizing that a large institutional investor with diverse interests in numerous enterprises such as Chase appears to be a particularly unlikely candidate for this assumption, as a desire to oversee the management of its many investments would be impracticable, if not impossible.

cable than it can turn back the hands of time. Further, the limited amount and nature of Chase's investment in Mediacom precludes such manipulations; as an institutional investor holding minority stock and firmly insulated from one company's management, Chase is effectively powerless to dictate day-to-day management in Mediacom. Further its minority share in Wireless One would prevent it from orchestrate nefarious strategies to stymie Wireless One's development. Third, as noted, the amount of overlapping service areas of Mediacom and Wireless One is almost *de minimus*. It is clear that even if Chase had anticompetitive aims with respect to its investments in Mediacom and Wireless One, it is incapable of realizing them.

In fact, as noted in Section I above, the current attribution standards for cable-MDS cross-ownership actually *hinder* the Commission's goal of promoting competition to cable because they impede the flow of capital to competitors such as Wireless One's MDS service. Although possessed of limited interests in both Mediacom and Wireless One, Chase was the flagship investor for Mediacom's acquisition of Cablevision Systems. Chase's reputation facilitated the involvement of other investors in the transaction. Absent Chase's involvement, Wireless One would face even more severe financing constraints, lessening the competition to cable, and Mediacom's development as an emerging market player would have been inhibited.

III. THE COMMISSION OUGHT TO REVISE ITS CABLE ATTRIBUTION RULES TO PERMIT INVESTMENTS WHICH DO NOT IMPLICATE THE POLICIES BEHIND EITHER THE CABLE ATTRIBUTION RULES OR CABLE-MDS CROSS-OWNERSHIP

A. Raise The Voting Stock Benchmark From 5 To At Least 10%.

At a minimum, the Commission should increase the level of nonattributable voting stock interest from 5% to at least 10%. An ownership interest of 10% simply does not confer the degree of ownership or control underlying the attribution rules. The 10% mark would at least present a more

targeted nexus between the cable-MDS cross-ownership restriction's goals and the means to implement those goals. An increase in the benchmark would increase the access to capital so critical both to the development of competitive MVPD services and to the inordinately expensive system upgrades cable needs to provide new and higher quality services to consumers in the coming years. Indeed, the Commission recognized in 1992 in the broadcast context that a "higher level [of 10%] nonattributable investment may well attract new sources of capital to the media market and would inevitably create greater flexibility for existing investors to increase their participation in backing media ventures."[19]

Not only would such an increase further the Commission's policy goals, it would bring the cable attribution rules into greater equilibrium with other percentage benchmarks the government uses to measure control. For example, partnership or stock interests under 40% held by small business or rural telephone companies are not attributed for purposes of the Commission's CMRS spectrum aggregation limit. Similarly, Congress allows non-U.S. citizens to hold up to 20% direct and 25% indirect equity interests in U.S. companies without having ownership attributed.[20] Further, as the Commission has recognized, a 10% benchmark is used to gauge ownership and control by other federal agencies, such as the SEC (for insider trading restrictions), DOT (air carrier certifications), the FTC (Clayton Act premerger notification and waiting period), and ICC (financial reporting).[21] Therefore, the adoption of at least a 10% threshold would bring the cable-MDS attribution standard into greater agreement with existing standards used to measure ownership and control.

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[19]Broadcast Investment NPRM at ¶ 9.

[20]47 U.S.C. § 310(b)(3) and (4).

[21]Broadcast Attribution NPRM at ¶¶ 37-43.

B. Apply The Limited Partnership Insulation Criteria To LLCs.

In the Broadcast Attribution NPRM, the Commission tentatively proposed to treat LLCs as it treats limited partnerships, which are exempt from attribution if they are sufficiently insulated from the management of the partnership and the broadcast licensee so certifies.[22] The criteria for insulation are stringent, preventing the limited partner from acting as an employee of the partnership if related to the media enterprises of the company, from serving as an independent contractor or agent of the partnership, and from either communicating with the partners regarding day-to-day management of the company or exercising the same voting rights as other partners.[23] The Commission currently treats LLCs as limited partnerships on an interim basis in the broadcast context, but that treatment does not apply to attribution for purposes of the cable-MDS cross-ownership rule.[24] However, in 1996, the Commission proposed to relax the strict attribution standard for cable-MDS ownership because "[the Commission] see[s] no reason to have different attribution criteria for broadcasting and MDS."[25] Therefore, a presumption ought to exist that treatment of cable attribution in LLCs should mirror attribution of LLCs in the broadcasting context. If the Commission thinks that the risks of anticompetitive behavior in the cable-MDS context warrant more restrictive rules, it must at least present credible evidence to that effect so as to avoid acting in an arbitrary and capricious manner.

Limited liability companies (LLCs) have emerged in recent years as an increasingly popular new business form, offering the management flexibility and pass-through tax advantages of a partnership and providing limited liability to its members. Arguably, the LLC currently is the most

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[22]Broadcast Attribution NPRM at ¶ 69.

[23]*Id.* at n.110.

[24]*See* 47 U.S.C. § 21.912, Note 1(A)(i).

[25]1996 FNPRM at ¶ 44.

favorable business form for investors. Therefore, if the Commission continues to apply strict attribution criteria to investments in LLCs in the cable-MDS context, it is effectively precluding significant amounts of investment in cable upgrades and wireless cable. This unintended but certain outcome contradicts the fundamental Commission goal of facilitating investment in cable and wireless cable.

Mediacom wishes to re-emphasize two factors that should dispel concerns that minority share, institutional non-media investors such as Chase pose a threat to either the policies underlying the cable attribution rules or the cable-MDS cross-ownership restriction. First, the rigidity of the insulation criteria virtually eliminates the possibility that investors could exercise even the slightest influence on the LLC's management. Second, institutional investors such as Chase hold interests in numerous companies; it would be impracticable if not impossible for Chase to meddle in the day-to-day management of these companies.

C. Apply The Broadcast Rules' Passive Investor Category To Cable Attribution For Cable-MDS Attribution And Broaden It To Include Institutional Investors

The need for capital to realize the Commission's competitive goals and the passive nature of investments by institutional investors such as Chase justify application of the passive investor category to cable-MDS attribution and the expansion of the category to include institutional investors. In 1984, to promote investing in broadcasting, the Commission adopted a 10% nonattributable limit for certain institutional investors deemed to be passive.[26] However, the Commission rejected entreaties

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[26] 1984 Attribution Order at ¶ 33. *See* 47 C.F.R. §73.3555 n.2(c). Of course, if the Commission adopts a 10% voting benchmark as urged, that threshold and the limit for passive investors would be equal. However, Mediacom makes this argument in the event the Commission does not raise the general voting benchmark and because it is only logical that passive investments ought to be allowed to own greater percentages of stock than other investors because they do not exercise influence or control over the entities in which they invest.

to expand the class of passive investors to include institutional investors because it was not convinced that institutional investors who retained voting power could truly be considered passive.[27] The Commission reiterated that uncertainty about investment and commercial banks in 1992.[28] While not currently applicable to cable-MDS attribution, the passive investor category ought to be applied to cable-MDS cross-ownership attribution because it will increase the availability of substantial capital investments without conferring ownership or control.

Mediacom proposes that the Commission apply the passive investor category from the broadcast context to cable-MDS attribution. The application of an expanded passive investor category to cable-MDS attribution reflects the inability of cable to warehouse competition in light of the increasingly competitive MVPD marketplace. Passive investments such as those possessed by Chase in Mediacom provide Chase with neither the incentive nor the ability to act in an anticompetitive manner. At the same time, classification of passive investors in the cable-MDS cross-ownership context would open up substantial new sources of capital to stimulate competition to cable and to provide much needed funds to upgrade cable systems.

Mediacom further proposes that this passive investor category as applied to cable ought to be expanded to encompass commercial banks such as Chase, so long as they certify that they will have only a *de minimus* role in management of the companies in which they invest. The category should not exclude investors that retain voting rights per se. The myopic focus on voting as a per se test for a lack of passivity, as is the case in the broadcast context, places far too much emphasis on voting as a proxy for influence or control and ignores the important development of commercial

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[27] *Id.* at ¶¶ 32-36.

[28] Broadcast Attribution NPRM at n.99.

banks as sources of capital. The retention of a voting interest is a standard method of obtaining some security for an investment. However, as perfectly demonstrated by Chase's investment in Mediacom, the existence of some voting rights does not by any means give the investor any meaningful control or influence over the company. While Chase can vote on the admission of new members, the Manager of Mediacom can render that vote moot by vetoing it. In addition, Chase's contingent right to vote to remove Mediacom's Manager must be preceded by the very remote occurrence of the Manager's having engaged in willful misconduct or gross negligence. Further, Chase does not have a vote on Mediacom's five member Executive Committee. Therefore, it makes no sense to exclude Chase's investment from a passive investor category simply because it possesses limited voting rights, particularly if Chase were to submit a certification that it exercises no influence or control over the company's management.

CONCLUSION

In its general deregulatory approach, the repeal of cross-ownership restrictions and the biennial review requirement of the Telecommunications Act, Congress has signaled its intent that competitive, legal and regulatory changes demand a reexamination of the Commission's rules, including its cross-ownership restrictions. The current version of the cable-MDS cross-ownership attribution rules sweeps in far too many investors than necessary to attain the attribution rules' goal to measure influence and control or to prevent the warehousing of competition to cable. This substantial overbreadth emerges clearly with regard to institutional, non-media investors such as Chase which hold minority interests and which have neither the incentive nor the power to implicate the anticompetitive concerns underlying the Commission's rules. By relaxing the severely restrictive cable-MDS cross-ownership attribution rules, the Commission would facilitate much-needed access to capital without creating risks of anticompetitive conduct. In particular,

the Commission should increase its voting stock benchmark to at least 10%, treat LLCs in the same manner as insulated limited partnerships are treated in the broadcasting context, and should apply an expanded passive investor category to the cable-MDS attribution context. These measures would rein in an overly restrictive set of rules that unnecessarily prevents cable and wireless providers from accessing enormous reservoirs of capital that would help the Commission realize its competitive goals without implicating anticompetitive concerns.

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